RULING ON WSPA DEMURRER

This Tentative Ruling is made by Judge George C. Hernandez, Jr. The demurrer of respondents-in-intervention Western States Petroleum Association et al. (the "Oil Industry Associations" or "Associations") to Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate ("Complaint") is OVERRULED. Associations challenge both causes of action on the grounds that the Environmental Protection Agency (EPA) is a necessary and indispensable party, but cannot be joined, requiring dismissal. (See CCP Â§ 389.) Because this is a demurrer, the issue must be decided based solely upon the facts properly pleaded in the Complaint and those properly subject to judicially notice. (Van Zant v. Apple Inc. (2014) 229 Cal.App.4th 965, 978.) Section 389 only requires dismissal of an action when a person, who is both "necessary" and "indispensable," cannot be joined as a party. (See CCP Â§389(b); Verizon California Inc. v. Bd. of Equalization (2014) 230 Cal.App.4th 666, 679 ["[A] person must be a necessary party to be an indispensable party."].) Pursuant to section 389(a), party is necessary if (1) "in his absence complete relief cannot be accorded among those already parties" or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. Here, the Associations have failed to establish that the EPA is a "necessary" party. First, Associations argue that in the EPA's absence, complete relief cannot be accorded among those already parties. (CCP Â§ 389(a)(1).) The total substance of this argument is a conclusory statement that EPA would not be bound by any judgment. (See Mem. ISO Demurrer at p. 11:20-21.) This argument is inconsequential in light of the EPA's grant of primacy to DOGGR, which permits the DOGGR (not the EPA) to enforce applicable law (California law, the UIC Program). Unless and until primacy is rescinded, there is no need for any court order to bind the EPA. Next, Associations argue that the EPA claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in EPA's absence may as a practical matter impair or impede EPA's ability to protect that interest. (CCP Â§ 389(a)(2)(i).) The proffered interest of the EPA is in the validity of the regulations challenged by Petitioners. However, Associations fail to explain how the EPA's absence impairs or impedes its ability to protect that interest, when DOGGR is present to defend those regulations as sufficient under the Administrative Procedures Act (APA) and applicable substantive law. If EPA has such an interest, it appears to be coextensive with DOGGR's interest in this lawsuit, and Associations have neither identified divergent interests or shown that DOGGR cannot defend those interests. (See, e.g., Deltakeeper v. Oakdale Irrigation Dist. (2001) 94 Cal.App.4th 1092, 1102.) Third, Associations argue that the EPA claims an interest relating to the subject matter of the action and that disposing of the action without the EPA threatens the existing parties with double, multiple or inconsistent obligations by reason of EPA's interest. (CCP Â§ 389(a)(2)(ii).) However, as the legal framework and the agreement between EPA and DOGGR currently stand, the DOGGR is free to issue immediate shutdown orders, prior to the safe harbor deadlines set forth in the challenged regulations; thus, if the court were to issue a shutdown order, it would not inevitably impede any interest of the EPA. Similarly, if the court were to find that the challenged regulations fail to discharge some mandatory duty under federal law, or that were not adopted in compliance with the APA, DOGGR may pursue new emergency regulations (consistent with its obligations under the SDWA, and thus, consistent with the EPA's interests) and in the meantime, pursue existing remedies such as individual shutdown orders. Finally, in the event that a court judgment required DOGGR to take

	action inconsistent with its agreement with the EPA, DOGGR could arguably turn to EPA, cancel the agreement, and have a defense of legal impossibility to any enforcement action by EPA. (See Deltakeeper, supra, at 1104-05, citing People ex rel. Lungren v. Cmty. Redevelopment Agency (1997) 56 Cal.App.4th 868, 879 n.7.) Thus, Associations have not shown that any of the kinds of relief sought by Plaintiff, should the court ultimately grant that relief, would impose multiple or inconsistent obligations on DOGGR. Because Associations have not shown that EPA is a necessary party, there is no need to consider whether the factors set forth in CCP Â§ 389(b) weigh in favor of, or against, dismissal of this action. Respondent and Respondents in Intervention shall respond as set forth in the court's contemporaneously-issued order on the demurrer of the Department/DOGGR. NOTICE: Effective June 4, 2012, the court has not provided a court reporter for civil law and motion hearings or any other hearing or trial in civil departments. See amended Local Rule 3.95.
RULING ON AERA DEMURRER	This Tentative Ruling is made by Judge George C. Hernandez, Jr. The demurrer of respondents-in-intervention Aera Energy LLC, et al. (the "Energy Companies") to Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate ("Complaint") is OVERRULED. This case concerns Class II well operations (associated with oil and gas production, including wells used for enhanced oil recovery, disposal of produced water and other specified oilfield wastes, and underground storage of hydrocarbons), which are regulated under California's Underground Injection Control (UIC) program. That program exists pursuant to a grant of "primacy" to the State of California by the Environmental Protection Agency (EPA), which would otherwise have exclusive authority to oversee and enforce the federal Safe Drinking Water Act (SDWA) in California. Instead, the EPA has approved the State's UIC program to regulate underground injections, and DOGGR to ensure compliance. As the court understands primacy, the State has adopted its own statutory and regulatory framework to regulate Class II wells, as well as policies and procedures for monitoring and enforcement, all of which met the EPA's approval, resulting in the grant of primacy, in 1983. The EPA remains empowered to determine whether California should retain primary enforcement authority and, to that end, oversees the UIC program. In 2011, the EPA audited California's UIC program and pressured DOGGR to improve compliance with the SDWA. However, the Energy Companies agree that there are formal procedures for revising or withdrawing the grant of primacy (Mem. ISO Demurrer at 3:5-6), which the EPA has not initiated. A. Express Preemption The Energy Companies first assert that the claims Plaintiffs/Petitioners ("Plaintiffs") are expressly preempted by federal law. Energy Companies' arguments are not entirely clear, but suggest that this lawsuit puts the court in danger of usurping the EPA's role in enforcing the SDWA in California, including the federal statutes and regulations governing grants of primacy. However, the EPA does not enforce the SDWA in California; it only oversees California state agencies in doing so. (See, e.g., Plaintiffs' RJN Exs. 1, 2, 3, 5.) These exhibits demonstrate that the enforcement authority has been delegated to the state, based upon a prior showing that the state had in place sufficient state statutes, regulations, and procedures for monitoring, enforcement and public input to meet the minimum standards set out in section 1425. (See id. Exs. 1, 5.) As the court understands it, California state agencies don't directly enforce the SDWA; they enforce the UIC program, approved by the EPA, which the EPA determined meets the same minimum standards as the SDWA. Further, Plaintiffs do not seek to alter EPA oversight of the UIC program; they seek to invalidate emergency regulations - which, although approved by the EPA, are state regulations, promulgated under state procedures. (See, e.g., Complaint Â¶Â¶ 93-96.) The

fact that the EPA may have accepted, for now, DOGGR's proposed emergency regulations as an acceptable means of bringing the State's UIC program in line with minimum requirements under Section 1425 does not somehow transform the challenged state-law regulations into federal law. Even if trial the court were to strike down the challenged emergency regulations, the EPA's authority over California's UIC program would not necessarily or inevitably be constrained or impacted: the EPA would remain free to initiate formal proceedings to revise the UIC program or withdraw primacy. Nor would an order striking the emergency regulations interfere with the federal substantive legal framework: The SDWA and federal regulations are unchallenged; and Cal DOGGR would remain free, pursuant to the existing, approved program to take other actions (e.g., individual enforcement actions andor proposing improved emergency regulations) to protect underwater sources of drinking water, consistent with DOGGR's obligations. Plaintiffs also request a broad shut-down order; however, that is only one type of relief sought. The demand does not warrant striking an entire cause of action, or an entire complaint. Should Defendants demonstrate, at trial, that the proposed shut-down is not essential to protect the State's sources of drinking water, and thus contravenes purposes of the SDWA (e.g., 42 USC Â§ 300h(b)(2)), this could present both preemption and merits issues which the court could evaluate based upon a complete factual record. Plaintiffs also point out that 42 USC Â§ 300h-2, which applies to Subchapter XII, Safety of Public Water Systems (including section 1425, under which California received primacy), states: "Nothing in this subchapter shall diminish any authority of a State or political subdivision to adopt or enforce any law or regulation respecting underground injection but no such law or regulation shall relieve any person of any requirement otherwise applicable under this subchapter." Thus, the SDWA would appear to preserve states' rights to enforce the SDWA, subject to minimum requirements. Although the court does not believe that Plaintiffs can, in this case, enforce the SDWA (as opposed to state law), it appears that Plaintiff's approach is not expressly preempted. Perhaps most importantly, the express preemption argument flies in the face of the plain purpose of the entire federal statutory framework, which permits the EPA "to put states in charge" of enforcing the SDWA through their own, pre-approved, legal and regulatory frameworks. B. Field Preemption For the same reasons, the Companies' field preemption arguments fail. The SDWA's regulatory scheme is not so comprehensive to "leave no room" for state regulation. Quite the opposite, it is designed to delegate regulation to the states that have demonstrated they can meet certain minimum requirements. To the extent that the Energy Companies contend that California's APA is preempted, that Act is a law of general application concerning rulemaking and promulgation of laws by state agencies, generally, and is not a law on the "same subject" as the SDWA. (Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n (1983) 461 U.S. 190, 204.) This argument applies with equal force to California's writ procedures (CCP Â§Â§ 1085, 1094.5). C. Conflict Preemption Energy Companies assert that Plaintiffs' requested relief would conflict with federal law in two ways: (1) it physically impossible to comply with both state and federal law; and (2) the state law would be an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (Freightliner Corp. v. Myrick (1995) 514 U.S. 280, 287.) As noted above, at least some of the relief sought by Plaintiffs, if granted, would not prevent DOGGR from complying with federal law, i.e., the approved UIC program. Were the emergency regulations invalidated, DOGGR has other means of compliance. The EPA's view (assuming it is correct) that these emergency regulations are critical to SDWA compliance does not deprive DOGGR of the ability or authority to engage in other, more robust compliance

activities that still would not impermissibly interfere with or impede oil and gas production in California, in violation of 42 USC Â§ 300h(b)(2 The Energy Companies also contend that Plaintiffs' sought-after relief would constitute an obstacle to the objectives of the SDWA. As discussed above, the SDWA expressly permits a grant of primacy, envisioning the enactment of state statutes and regulations for underground injection programs, with some EPA oversight over the adequacy of the UIC program. The objective of the primacy provisions is to allow states to implement and enforce their own EPA-approved programs, with only some EPA oversight. Contrary to Energy Companies' argument, those state laws (and the courts that enforce them) can regulate and, where essential to protect underground sources of drinking water, prohibit, certain operations related to energy production. (See Mem. ISO Demurrer at 12:26; 42 USC Â§ 300h(b)(2).) The Energy Companies also argue that a court order (invalidating the emergency regulations or requiring a shut-down of a substantial number of non-exempt wells) would eviscerate the "method chosen" by the EPA to realize the full purpose of the SDWA. Energy Companies have not shown how Plaintiff's sought-after relief threatens to interfere with or constitutes an end-run around the "methods chosen" for enforcement in the SDWA. Again, the SDWA permits delegations of primacy, which contemplates both the enactment of independent state laws and regulations that meet certain minimum thresholds, and vesting state agencies with authority to enforce those state laws. Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Company (D.R.I. 1995) 878 F.Supp. 349 does not hold to the contrary. There, the court ruled that the state had no authority to regulate certain activities, pursuant to the SDWA, because those activities occurred on "Indian lands" and thus, were regulated by federal law (including the SDWA) and not subject to Rhode Island's grant of primacy, which only applied to non-Indian lands within the state; on appeal, the determination that the activities occurred on "Indian lands" was reversed - as was the finding of preemption. (See Narragansett Indian Tribe v. Narragansett Electric Company (1st Cir. 1996) 89 F.3d 908.) Even assuming that the informally-expressed views of the EPA that the emergency regulations are critical to ensuring compliance with the SDWA constitute a "method of enforcement" that preempts contradictory state law, those views are subject to more than one reasonable interpretation and the precise meaning of the EPA's stance is not appropriately decided at the pleadings stage. (That statement could be reasonably construed as EPA's view that the emergency regulations are the minimum action necessary; not the only action consonant with the SDWA's minimums.) Further, Plaintiffs do not challenge the EPA's informal actions, but the State's formal actions, under both the APA and California's writ provisions. For the foregoing reasons, the demurrer is OVERRULED. Respondent and Respondents in Intervention shall respond as set forth in the court's contemporaneously-issued order on the demurrer of The Department/DOGGR. NOTICE: Effective June 4, 2012, the court has not provided a court reporter for civil law and motion hearings or any other hearing or trial in civil departments. See amended Local Rule 3.95.

RULING ON DOGGR DEMURRER

This Tentative Ruling is made by Judge George C. Hernandez, Jr. The demurrer of respondent California Department of Conservation, Division of Oil, Gas and Geothermal Resources (the "Department" and "DOGGR," respectively) to second cause of action is SUSTAINED WITHOUT LEAVE TO AMEND, for the reasons set forth below. This case concerns Class II well operations (associated with oil and gas production, including wells used for enhanced oil recovery, disposal of produced water and other specified oilfield wastes, and underground storage of hydrocarbons), which are regulated under California's Underground Injection Control (UIC) program. That program exists pursuant to a grant of

"primacy" to the State of California by the Environmental Protection Agency (EPA), which would otherwise have exclusive authority to oversee and enforce the federal Safe Drinking Water Act (SDWA) in California. Instead, the EPA has approved the State's UIC program (consisting of state law) to regulate underground injections, and the Department/DOGGR to ensure compliance. The Complaint and judicially-noticed materials suggest that the grant of primacy remains in place and do not state that the EPA has taken any steps to rescind or modify that grant of primacy. The second cause of action (writ of mandate under CCP Â§ 1085) alleges both that the Department (through its division, DOGGR) has violated non-discretionary and discretionary duties by failing to "strictly follow state and federal law requirements" to protect California's non-exempt aquifers from contamination and harm. (See Compl. Â¶Â¶ 92-94, 96.) The Department argues that no ministerial duty has been identified and the violation of such a duty is not pleaded. Petitioners/Plaintiffs Center for Biological Diversity et al. (Plaintiffs) respond that such mandatory duties are found in federal law (the SDWA) and the Memorandum of Understanding entered into between the EPA and DOGGR. However, as the court understands the SDWA, once a state receives a grant of primacy from the EPA, the EPA does not directly enforce the SDWA (at least as to UIC operations) in that state. Here, pursuant to the still-standing grant of primacy, the State of California enforces California state statutes, regulations, and operational policies that comprise its "UIC Program" which has been approved by the EPA. Under section 1425, California's UIC program can receive approval (for primacy application purposes) even if it differs from the requirements of the SDWA and federal regulations, provided that it meets certain minimums. Thus, once a 1425 approval is provided, the state cannot be subject to both SDWA and its own UIC program. Plaintiffs do not explain how DOGGR can be bound to enforce the provisions of the SDWA (or related federal regulations) when the State has an approved UIC Program, comprised of state law, in place, which EPA has not taken formal steps to modify or withdraw. Nor do Plaintiffs do identify a California state law binding the DOGGR that sets forth any mandatory duty. By contrast, Defendants have identified several provisions of the California Public Resources Code that grant DOGGR discretion in regulating oil and gas injection wells, requiring the application of wisdom and judgment to determine what actions are necessary to protect the environment, including water supplies. (See Public Resources Code Â§Â§ 3106, 3224, 3226.) Plaintiffs also argue that the Memorandum of Agreement entered into with the EPA sets forth duties that are enforceable against the Department/DOGGR. Regardless of whether the duty at issue is mandatory or discretionary, it is contractual. It concerns the grant of primacy. If Plaintiffs wish to litigate a breach of the MOA by the State in order to compel a modification or withdrawal of primacy, they have other remedies in the federal system. (See, e.g., Legal Envtl. Assistance Found., Inc. v. U.S. E.P.A. (11th Cir. 1997) 118 F.3d 1467, 1471 [available remedy]; CCP Â§ 1086 [writ shall not issue where there is a plain, speedy, and adequate remedy, in the ordinary course of law].) Further, contractual obligations, as opposed to duties of office, are not enforceable by writ. (See, e.g., Wenzler v. Mun. Court of Pasadena Judicial Dist. (Ct. App. 1965) 235 Cal.App.2d 128, 132.) Plaintiffs' argument that the MOA is incorporated into federal law relies upon what appears to be entirely inapposite authority. In United States v. King (9th Cir. 2011) 660 F.3d 1071, the federal government prosecuted an operator for underground injections of wastewater in violation of specific Idaho state statutes, which made up an UIC program approved by the EPA. (Id. at 1077-78.) Here, Plaintiffs are not public prosecutors, do not sue an operator but a state agency, and focus on alleged violations of federal law, not the state UIC program. The Department also argues that even if the Complaint identified some discretionary duty to act that was

enforceable by writ (i.e., a state law obligation), the Complaint admits that the Department responded to the EPA's 2011 audit, albeit not swiftly or comprehensively enough to satisfy Plaintiffs. "To compel the Department to take some action the Foundation must plead and prove the Department has failed to act, and its failure to act is arbitrary, beyond the bounds of reason, or in derogation of the applicable legal standards." (AIDS Healthcare Found. v. Los Angeles Cnty. Dep't of Pub. Health (2011) 197 Cal.App.4th 693, 704.) Contrary to Plaintiffs' arguments, the allegations of the Complaint, particularly paragraphs 45-76, cannot fairly be read as a wholesale failure to act. (Id. at 705.) Additional, judicially-noticed materials evidence more than "just talk" by the Department in response to the problems identified by the EPA. (See, e.g., Plaintiffs' RJN Exs. 3-4.) In fact, Plaintiffs allege that DOGGR has not enforced the UIC Program effectively, competently, and aggressively enough. However, where reasonable minds could differ, a discretionary call by the respondent should not be disturbed by the court. (California Corr. Supervisors Org., Inc. v. Dep't of Corr. (2002) 96 Cal. App. 4th 824, 832.) Otherwise, serious separation of powers issues arise. (See, e.g., 830-31 [employee safety statutes - even those requiring employers to adopt safety devices and methods to ensure safety and "every other thing reasonably necessary" to protect employees - do not vest the judiciary with the power to act as an overseer of legislative and executive decisions about what is or is not reasonable safety in a given workplace]. See also Schwartz v. Poizner (2010) 187 Cal.App.4th 592, 598.) Given the facts already before the court, in the Complaint and judicially-noticed materials, the conclusion that "reasonable minds could differ" on how the Department/DOGGR should exercise its discretion in administering the UIC programs appears almost inevitable. Plaintiffs have not requested leave to amend and, in light of the existing allegations, the court questions whether they could do so in good faith. Thus, the demurrer is SUSTAINED WITHOUT LEAVE TO AMEND as to the second cause of action, only. Defendants/Respondents shall have 20 days to answer (plus 5 extra days for service by mail under C.C.P. Â§ 1013), which time shall run from the date on the Clerk's certificate of mailing of this Order. NOTICE: Effective June 4, 2012, the court has not provided a court reporter for civil law and motion hearings or any other hearing or trial in civil departments. See amended Local Rule 3.95.